Chuah Geok Yan (t/a Marina Machinery Trading) & Anor v Power Star Machinery Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12ANCC-9–02 OF 2018
SM KOMATHY J
27 FEBRUARY 2019

Civil Procedure — Summary judgment — Application for — Plaintiff brought action against defendants for goods sold and delivered — Plaintiff applied for summary judgment — Whether any triable issues raised — Rules of Court 2012 O 14

Evidence — Documentary evidence — Computer printout — Admissibility — Whether invoices and statements of accounts admissible — Evidence Act 1950 ss 73(1) & 90A

This was an appeal by the first and second appellants ('the defendants in the court below') against the decision of the learned sessions judge who allowed the respondent's ('the plaintiff in the court below') application to enter summary judgment against them. The plaintiff was a company dealing in the supply of welding products. The defendants were brothers. The first defendant was the sole proprietor of a firm known as Marina Machine Trading. The plaintiff company brought an action against the first and second defendants for the sum of RM585,082.70, being the price of goods sold and delivered to Marina Machine Trading. The claim against the second defendant was based on a letter of guarantee and indemnity signed by him. The defendants filed a joint defence alleging that at the material time the first defendant could not have ordered and received the goods as he was suffering from schizophrenia with obsessive compulsive disorder ('OCD'). In the alternative, it was pleaded that that even if the goods were received, there was no liability to pay as the goods were found not to be of satisfactory quality and had been returned to the plaintiff. It was further pleaded that the guarantee executed by the second defendant was in favour of a company called Marina Marketing Sdn Bhd and not the first defendant's company, Marina Machinery Trading. In the alternative, the second defendant alleged that he was pressured by the plaintiff to sign the guarantee in favour of Marina Machinery Trading. The plaintiff applied for summary judgment application under O 14 of the Rules of Court 2012. In support of the application, the plaintiff exhibited and relied on invoices and statements of accounts issued to the first defendant. The defendants sought dismissal of the application on the ground that there were triable issues ie: (a) whether the first defendant was of unsound mind; (b) whether the letter of

guarantee and indemnity was valid; (c) whether the goods were in fact received by the defendants; and (d) whether the invoices and statements of accounts were admissible. However, the learned sessions judge held that the issues lacked bona fides and allowed the application. Hence, this appeal.

Held, allowing the appeal with costs:

(1) There was nothing in the first defendant's medical report which indicated that his condition impaired his ability to run a business. There was evidence that he set up his business, Marina Missionary Trading on 12 December 2014. If indeed he had been incapable of conducting the business of Marina Machinery Trading as he alleged, no explanation was proffered as to how he knew the process involved in setting up his business. The defence that the first defendant was *non compos mantis* to have ordered the goods simply did not hold water (see paras 12–13).

(2) The defendants proffered no explanation as to how the company seal of Marina Machinery Trading came to be affixed on the guarantee. In the absence of any explanation, the second defendant's allegation that he had signed a blank form was unconvincing. This raised serious doubts on the bona fides of the defence that the guarantee was invalid (see para 14).

(3) The defendants contended that the sessions judge was wrong in comparing the signatures on the invoices with the second defendant's admitted signatures, and found them to be similar as he was not a handwriting expert. The defendants submission was contrary to s 73(1) of the Evidence Act 1950 ('the Act') (see paras 15–16).

(4) Even if s 90A of the Act did not apply to O 14 applications, it was clear that where a litigant wished to rely on the contents of a computer generated document it was necessary to establish that it was safe to rely on the document by adducing evidence as to the computer's reliability. In the instant appeal, there was no such evidence. There was no averment in the plaintiff's affidavit that the invoices and statements of account were computer generated documents produced in the course of the ordinary use of the office computer that generated them. Hence, the invoices and statements of account were inadmissible and should not had being taken into account. Bereft of the invoices and statements of account there was no evidence to show the amount owing to the plaintiff (see paras 16 & 22–24).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu pertama dan kedua ('defendan di mahkamah bawahan') terhadap keputusan hakim mahkamah sesyen yang bijaksana yang membenarkan permohonan responden ('plaintif di mahkamah bawahan') untuk memasuki penghakiman terus terhadap mereka. Plaintif adalah syarikat yang berurusan dengan pembekalan produk kimpalan. Defendan-defendan

adalah adik-beradik. Defendan pertama adalah pemilik tunggal firma yang dikenali sebagai Marina Machine Trading. Syarikat plaintif membawa tindakan terhadap defendan pertama dan kedua untuk jumlah RM585,082.70, iaitu harga barangan yang dijual dan dihantar ke Marina Machine Trading. Tuntutan terhadap defendan kedua adalah berdasarkan surat jaminan dan indemniti yang ditandatangani olehnya. Defendan memfailkan pembelaan bersama yang mendakwa bahawa pada masa yang material defendan pertama tidak mungkin memesan dan menerima barang-barang itu kerana dia menderita skizofrenia dengan gangguan obsesif kompulsif ('OCD'). Selain itu, adalah diplidkan bahawa walaupun barangan itu diterima, tiada tanggungjawab untuk membayar kerana barangan itu didapati tidak berkualiti dan telah dikembalikan kepada plaintif. Adalah seterusnya diplidkan bahawa jaminan yang disempurnakan oleh defendan kedua itu memihak kepada sebuah syarikat bernama Marina Marketing Sdn Bhd dan bukan syarikat defendan pertama, Marina Machinery Trading. Sebagai alternatif, defendan kedua mendakwa bahawa dia diletakkan tekanan oleh plaintif untuk menandatangani jaminan yang memihak kepada Marina Machinery Trading. Plaintif memohon permohonan penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah 2012. Sebagai sokongan permohonan itu, plaintif mengekshibitkan dan bergantung kepada invois dan penyata akaun yang dikeluarkan kepada defendan pertama. Defendan memohon penolakan permohonan atas alasan bahawa terdapat isu-isu yang boleh dibicarakan iaitu: (a) sama ada defendan pertama adalah tidak waras; (b) sama ada surat jaminan dan indemniti adalah sah; (c) sama ada barang itu sebenarnya diterima oleh defendan; dan (d) sama ada invois dan penyata akaun boleh diterima. Walau bagaimanapun, hakim mahkamah sesyen yang bijaksana berpendapat bahawa isu-isu tidak mempunyai bona fide dan membenarkan permohonan itu. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Tiada apa-apa dalam laporan perubatan defendan pertama yang menyatakan bahawa keadaannya menjejaskan keupayaannya untuk menjalankan perniagaan. Terdapat bukti bahawa dia menubuhkan perniagaannya, Marina Missionary Trading pada 12 Disember 2014. Jika sesungguhnya dia tidak mampu menjalankan perniagaan Marina Machinery Trading seperti yang dikatakannya, tiada penjelasan yang dilaporkan mengenai bagaimana dia mengetahui proses yang terlibat dalam menubuhkan perniagaannya. Pembelaan bahawa defendan pertama adalah *non compos mantis* untuk telah memesan barang-barang itu tidak munasabah (lihat perenggan 12–13).

(2) Defendan-defendan tidak memberi penjelasan tentang bagaimana meterai syarikat Marina Machinery Trading dilekatkan pada jaminan. Dalam ketiadaan sebarang penjelasan, tuduhan defendan kedua bahawa dia telah menandatangani borang kosong adalah tidak meyakinkan. Ini

menimbulkan keraguan yang serius terhadap bona fide pembelaan bahawa jaminan adalah tidak sah (lihat perenggan 14).

(3) Defendan berpendapat bahawa hakim mahkamah sesyen adalah salah dalam membandingkan tanda tangan pada invois dengan tandatangan defendan kedua yang diterima, dan mendapati mereka sama kerana beliau bukan pakar tulisan tangan. Hujahan defendan bertentangan dengan s 73(1) Akta Keterangan 1950 ('Akta') (lihat perenggan 15–16).

(4) Sekalipun sekiranya s 90A Akta tidak terpakai bagi permohonan A 14, adalah jelas bahawa jika seorang litigan berharap untuk bergantung pada kandungan dokumen yang dihasilkan oleh komputer, adalah perlu untuk memastikan bahawa ia adalah selamat untuk bergantung kepada dokumen dengan menambah keterangan mengenai reabiliti komputer. Dalam rayuan ini, tiada keterangan sedemikian. Tiada kenyataan dalam afidavit plaintif bahawa invois dan penyata akaun adalah dokumen yang dihasilkan oleh komputer yang dihasilkan dalam penggunaan biasa komputer pejabat yang menghasilkannya. Oleh itu, invois dan penyata akaun tidak dapat diterima dan tidak boleh diambil kira. Dengan kekurangan invois dan penyata akaun tiada keterangan untuk menunjukkan jumlah yang terhutang kepada plaintif (lihat perenggan 16 & 22–24).]

Notes

For cases on application for summary judgment, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9868–9950.

Cases referred to

Ahmad Najib bin Aris v Public Prosecutor [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006]3 CLJ 544, HC (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)

Gnanasegaran a/l Pararajasingam v Public Prosecutor [1997] 3 MLJ 1; [1997] 4 CLJ 6, CA (refd)

Hanafi bin Mat Hassan v Public Prosecutor [2006] 4 MLJ 134, CA (refd)

Mohd Khayry bin Ismail v Public Prosecutor [2014] 4 MLJ 317, CA (refd)

Legislation referred to

Evidence Act 1950 ss 2, 73(1), 90A, 90A(2), (4)

Rules of Court 2012 O 14, O 41 r 5(2)

YH Wong (Wong & Co) for the appellant.

YY Ho (KK Tan with him) (YY Ho & Lee) for the respondent.

SM Komathy J:

[1] This is an appeal by the first and second appellants (the defendants in the court below) against the decision of the learned sessions judge who on 13 February 2018, allowed the respondent's (the plaintiff in the court below) application to enter summary judgment against them. For convenience I shall hereinafter refer to the parties as they were in the court below.

BACKGROUND FACTS

[2] The plaintiff is a company dealing in the supply of welding products.

[3] The defendants are brothers. The first defendant is the sole proprietor of a firm known as Marina Machine Trading.

[4] The plaintiff company brought an action against the first and second defendants on 12 September 2017 for the sum of RM585,082.70, being the price of goods sold and delivered to Marina Machine Trading. The claim against the second defendant was based on a letter of guarantee and indemnity signed by him on 2 January 2016.

[5] The defendants filed a joint defence. In their defence, the second defendant alleged that at the material time the first defendant could not have ordered and received the goods as he was suffering from schizophrenia with obsessive compulsive disorder ('OCD'). In the alternative, it was pleaded that that even if the goods were received, there was no liability to pay as the goods were found not to be of satisfactory quality and had been returned to the plaintiff. It was further pleaded that the guarantee executed by the second defendant was in favour of a company called Marina Marketing Sdn Bhd and not the first defendant's company, Marina Machinery Trading. In the alternative, the second defendant alleged that he was pressured by the plaintiff to sign the guarantee in favour of Marina Machinery Trading.

[6] On 4 December 2017, the plaintiff applied for summary judgment application under O 14 of the Rules of Court 2012. In support of the application, the plaintiff exhibited and relied on invoices and statements of accounts issued to the first defendant. The defendants sought dismissal of the application on the ground that there were four triable issues identified as:

(a) whether the first defendant was of unsound mind;

(b) whether the letter of guarantee and indemnity was valid;

(c) whether the goods were in fact received by the defendants; and

(d) whether the invoices and statements of accounts were admissible.

[7] The learned sessions judge held that the issues lacked bona fides and allowed the application.

ISSUES RAISED ON APPEAL

[8] Before me, the defendants sought to over-turn the sessions judge's decision and to ask for unconditional leave to defend by asserting that the sessions judge erred in holding that there were no triable issues. The defendants canvassed the same issues raised in the court below.

THE LAW ON SUMMARY JUDGMENT

[9] The power of the court to grant summary judgment is found under O 14 of the Rules of Court 2012. The law governing summary judgment is trite and was succinctly elucidated by the Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006]3 CLJ 544. In order to obtain judgment, a plaintiff has first to show that he has a prima facie case for judgment. Once he has done that, the burden shifts to the defendant who, in order to obtain leave to defend must establish that there is a fair or reasonable probability that he has a real or bona fide defence.

[10] It is also settled law that leave to defend will not be granted based upon 'mere assertions' by defendants; instead, the court will look at the whole situation critically to examine whether the defence is credible. In the Privy Council case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 at p 217, Lord Diplock explained it as thus:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as 'he may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

[11] With these principles in mind, I turn now to examine the four issues raised by the defendant.

MENTAL COMPETENCE OF D1

[12] I take first the point that the first defendant was of unsound mind and could not have ordered the goods. The second defendant produced the first

defendant's medical report and his treatment cards issued by the psychiatry unit at Kuala Lumpur Hospital. The documents showed that sometime in October 2004, the first defendant was diagnosed with schizophrenia with OCD and continues to receive treatment at the said hospital. There is nothing in the report which indicates that the first defendant's condition impaired his ability to run a business. There is evidence that he set up his business, Marina Missionary Trading on 12 December 2014. If indeed he had been incapable of conducting the business of Marina Machinery Trading as he alleged, no explanation was proffered as to how he knew the process involved in setting up his business.

[13] Looking at the evidence which the defendants relied on, I am in agreement with the sessions judge that the defence that the first defendant was *non compos mantis* to have ordered the goods simply does not hold water.

LETTER OF GUARANTEE

[14] It is apt at this juncture to deal with the defendants' claim that the letter of guarantee was invalid. The second defendant relied on the police report that he had lodged after the filing of the action to support his allegation that the letter of guarantee that he and his brother had signed was intended for Marina Marketing Sdn Bhd. He alleged that at the material time when he executed the letter of guarantee, it was a blank form. The plaintiff, he alleged, had inserted Marina Machinery Trading without his knowledge and consent. If this is true, the defendants proffered no explanation as to how the company seal of Marina Machinery Trading came to be affixed on the guarantee. In the absence of any explanation, the second defendant's allegation that he had signed a blank form is unconvincing. The sessions judge held, and I agree, that this raised serious doubts on the bona fides of the defence that the guarantee is invalid.

ADMISSIBILITY OF INVOICES AND STATEMENTS OF ACCOUNT

[15] I will now take the third and fourth issues together ie the invoices and statements of accounts relied on by the plaintiff to prove its claim. The facts are these. The invoices carried a signature. The plaintiff claimed they belonged to the second defendant, whilst the second defendant denied it. The sessions judge resolved this issue by comparing the signatures on the invoices with the second defendant's admitted signatures, and found them to be similar.

[16] It was the defendants contention that the sessions judge was wrong in adopting that approach as he was not a handwriting expert. I find the defendants submission on this point is contrary to s 73(1) of the Evidence Act 1950 ('the Act') which provides:

A In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or *by court* with the one which is to be proved although that signature, writing or seal has not been produced or proved for any other purpose.

B

[17] The defendants next complaint relates to the admissibility of the plaintiff's invoices and statements of accounts. It was common ground that these were computer generated documents. The defendants argued that the C contents of a computer-generated document can only be proved either by producing a certificate as required by s 90A(2) or calling the maker. In support of this proposition, reliance was placed on the decision of the Court of Appeal in *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1; [1997] 4 CLJ 6. The defendants argued that as no certificate was tendered, D the plaintiff's invoices and accounts were inadmissible.

[18] In response, the plaintiff argued that s 90A does not apply to interlocutory applications like summary judgment applications which are E decided by affidavit evidence. In support of this proposition, the plaintiff relied on O 41 r 5(2) of the ROC which permits an affidavit to contain hearsay evidence, and s 2 of the Act provides that the provisions of the Act do not apply to affidavit evidence.

F **[19]** The plaintiff also argued that s 90A of the Act is not the only law under which computer-generated documents can be admitted in evidence. The case of *Mohd Khayry bin Ismail v Public Prosecutor* [2014] 4 MLJ 317 was cited in support of this argument. The plaintiff argued that computer-generated documents can also be admitted under any provision of law which is an G exception to the hearsay rule. The plaintiff argued that O 41 r 5(2) of the ROC was one such exception.

[20] I turn now to consider the competing submissions. The Federal Court in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ H 800 endorsed the view expressed by the Court of Appeal that in *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134 that s 90A is the only law under which that computer-generated documents can be admitted.

I agree with the views expressed in the above passages from *Hanafi Mat Hassan v* I *Public Prosecutor* in the analysis of s 90A. In substance therefore the fact that a document was produced by a computer in the course of its ordinary use may be proved by the tendering in evidence of a certificate under s 90A(2) or by way of oral evidence. Such oral evidence must consist not only a statement that the document was produced by a computer in the course of its ordinary use but also the matters presumed under s 90A(4).

[21] It would be useful if I set out s 90A(4):

> Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects, throughout the material part of the period during which the document was produced

[22] In my view, even if s 90A does not apply to O 14 applications, it is clear that where a litigant wishes to rely on the contents of a computer generated document it is necessary to establish that it is safe to rely on the document by adducing evidence as to the computer's reliability. In the instant appeal, there is no such evidence.

[23] There is another defect. The plaintiff's affidavit in support was affirmed by one Peng Gai Hock, a director in the company. There is no averment in his affidavit that the invoices and statements of account are computer generated documents produced in the course of the ordinary use of the office computer that generated them.

[24] For the reasons given, I agree with the defendants submission that the invoices and statements of account were inadmissible and should not have being taken into account. Bereft of the invoices and statements of account there is no evidence to show the amount owing to the plaintiff.

CONCLUSION

[25] In the result, I allow the appeal with costs.

Appeal allowed with costs.

Reported by Nabilah Syahida Abdullah Salleh